

No. 78-688

OCT 23 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

CENTURY 21 REAL ESTATE CORPORATION;
CENTURY 21 REAL ESTATE OF ARIZONA, INC.;
SOUTHERN NEVADA FRANCHISE SERVICE CO., INC.,
ROBERT E. BARRETT;
AND BARRETT & CO., INC., REALTORS,
Appellants,

v.

NEVADA REAL ESTATE ADVISORY COMMISSION;
ROBERT W. HASS, ELIZABETH M. KROLAK;
FRED M. SCHULTZ; OLIVIA D. SILVAGNI;
CARL F. FUETSCH; AND ANGUS W. MCLEOD,
Appellees.

On Appeal from the United States District Court
for the District of Nevada

JURISDICTIONAL STATEMENT

ERWIN N. GRISWOLD
FREDERICK W. CLAYBROOK, JR.

Attorneys for Appellant

Of Counsel:

JONES, DAY, REAVIS & POGUE
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

JOHN P. MORAVEK, ESQ.
Vice President and Counsel
Century 21 Real Estate Corp.
18872 MacArthur Blvd.
Irvine, California 92715

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JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the three-judge district court (App. A, *infra*, pp. 1a-9a), and its order denying the motion for reconsideration of its opinion (App. B, *infra*, pp. 10a-12a) have not yet been reported.

JURISDICTION

The judgment of the three-judge district court was entered on June 28, 1978. (App. C, *infra*, p. 13a.) The notice of appeal was timely filed on August 25, 1978. (App. D, *infra*, pp. 14a-15a.) The jurisdiction of this Court rests on 28 U.S.C. §§ 1253 and 2281 (1970).¹

QUESTIONS PRESENTED

Section VII(4) of the Rules and Regulations of the Nevada Real Estate Advisory Commission² provides that a real estate broker who uses a franchise name may not use the franchisor's service mark unless the broker's name occupies not less than fifty percent of the combined surface area.

The questions raised are:

1. Whether this provision violates the First Amendment as it is made applicable to the states by the Fourteenth Amendment.

2. Whether this provision violates the due process and equal protection clauses of the Constitution because—

(a) no rational basis or legitimate state interest exists to uphold the 50:50 rule, and it amounts to an irrational conclusive presumption; and

¹ The complaint seeking an injunction against the enforcement of the regulation was filed on July 19, 1976. Jurisdiction was based in part on 28 U.S.C. §§ 2281 and 2284 (1970). The repeal of section 2281 by the Act of August 12, 1976, Pub. L. 94-381, 90 Stat. 1119, is not applicable "to any action commenced on or before the date of enactment."

² Section VII(4) was promulgated pursuant to the authority granted by Nevada Revised Statutes § 645.190(2), *infra* p. 19a.

(b) the bias of the Commission members who issued the regulation violates appropriate due process standards.

3. Whether this provision is preempted by the Lanham Act, 15 U.S.C. §§ 1051 *et seq.* (1970), and thus violates the supremacy clause of the Constitution.

4. Whether summary judgment was appropriate to determine whether this provision violates the Commerce Clause of the Constitution due to its burden on interstate commerce.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, clause 8, of the Constitution provides, in pertinent part, as follows:

The Congress shall have Power . . . To regulate Commerce . . . among the several States

Article VI of the Constitution provides, in pertinent part, as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The First Amendment to the Constitution provides, in pertinent part, as follows:

Congress shall make no law . . . abridging the freedom of speech, or of the press

The Fourteenth Amendment to the Constitution provides, in pertinent part, as follows:

. . . No State shall . . . deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED³

Nevada Revised Statutes § 645.190(2) provides, in pertinent part, as follows:

The [real estate advisory] commission . . . may from time to time adopt reasonable regulations for the administration of this chapter.

REGULATION INVOLVED

Section VII(4) of the Rules and Regulations of the Real Estate Advisory Commission provides as follows:

Any broker who operates under or uses a franchise name shall:

a. register such franchise name with the division on a form to be supplied by the division; and

b. incorporate in the franchise name and logotype his own name; however, the broker's name may not be less than 50 percent of the surface area of the entire combined area of both the broker's name and the franchise name or logotype; and

c. conspicuously display on or in all his advertising, and on his letterhead, deposit receipt forms, listing agreements and other printed materials generally available to the public a statement to the effect that his real estate brokerage office is independently owned and operated.

For the purposes of this section, the term "broker's name" is that name which appears on the real estate broker's license granted by the Nevada Real Estate Division.

³ Other relevant provisions of the Nevada Revised Statutes are set forth in Appendix E, *infra*, pp. 16a-22a.

STATEMENT

A. Factual Background

The case was heard by the court below on cross-motions for summary judgment. The pleadings, depositions, affidavits and other papers filed in support of the motions provide the following factual background.

Appellant Century 21 Real Estate Corporation (Century 21) is a California corporation. It was organized in 1971 to engage in the business of developing and operating a network of franchised real estate brokerage offices. Since 1971, Century 21 has entered into twenty-nine regional subfranchise agreements with various corporations. These agreements authorize the subfranchisors to license the Century 21 service mark and system to real estate brokers. As of July 1976, the twenty-nine subfranchisees of Century 21 were operating in approximately forty states and had licensed over 2,000 real estate brokerage offices to use the Century 21 trade name and service mark.

On July 1, 1973, Century 21 executed a subfranchise agreement with appellant Century 21 Real Estate of Arizona, Inc. (Century 21 of Arizona). Pursuant to the terms of the subfranchise agreement, Century 21 of Arizona formed appellant Southern Nevada Franchise Service Co., Inc. (Southern Nevada), for the purpose of licensing the use of the "CENTURY 21" service mark and system to real estate brokers in Nevada.

On December 29, 1975, Southern Nevada entered into a franchise agreement with appellants Robert E. Barrett and Barrett & Co., Inc. Realtors (Barrett), which granted Barrett a license to use the service mark and trade name "CENTURY 21," as well as to utilize poli-

cies, procedures, copyrighted materials, and techniques developed by Century 21 to enable real estate brokerage offices to give better service and to compete more effectively in the real estate sales market.

The standard Century 21 franchise agreement is utilized by the appellants throughout the United States and was utilized in this instance with appellant Barrett. It provides that each broker must disclose in his operating materials that his office is independently owned and operated. It also grants to the franchised real estate broker the right to use the service mark and trade name "CENTURY 21" in a form where the franchisee's name shall not exceed twenty percent of the surface area of the Century 21 name and logo. This service mark, in the 5 to 1 ratio,⁴ has been registered by the United States Patent and Trademark Office and is set out in Appendix F at pages 23a—a.⁵

The standard franchise agreement requires the service mark "CENTURY 21" to be five times larger in surface area than the broker's name in order to maintain nationwide uniformity of service mark usage, thereby enhancing the public recognition and goodwill associated with the mark. In this way, buyers and sellers of real estate may know that distinctive real estate brokerage services are available from well trained

⁴ The court below has referred to this registered service mark displaying this 5:1 ratio as an "80:20" format. *See, e.g., App. A, infra*, p. 3a.

⁵ The service mark "CENTURY 21" has been registered with the United States Patent and Trademark Office by appellant Century 21 on at least seven different occasions in various formats. The principal service mark utilized by the appellants in commerce is the registration displaying the 5:1 ratio.

brokers who consistently offer quality service in accordance with high standards. The use of a uniform service mark also permits franchisees to benefit from cost savings which result from mass production of standardized material for use in the operation of a real estate brokerage office.

On January 20, 1976, appellee McLeod, acting in his official capacity as the Administrator of the Nevada Real Estate Advisory Commission (Commission),⁶ requested an opinion from the office of the Attorney General of the State of Nevada as to whether Century 21's proposed method of operation within Nevada would violate Nevada law proscribing deceptive real estate advertising. On March 25, 1976, Robert List, Attorney General of the State of Nevada, and James I. Barnes, Deputy Attorney General of the State of Nevada, responded to Mr. McLeod's request in relevant part as follows:

No viable argument can be made that a broker who did business using the trade name "Century 21" would be making a misstatement of fact, or that he would be presenting as true that which was false. Each franchisee must inform the public that his office is "independently owned and operated." Nothing within either the proposals presented by Century 21 or the Agreement indicates prospective misrepresentation as a matter of law.

Five days later, on March 30, 1976, appellees Hass, Krolak, Schultz, Silvagni, and Fuetsch, acting in their joint capacity as the Commission, adopted by a ma-

⁶ Although termed the Nevada Real Estate *Advisory* Commission, the Commission has full authority to prescribe rules and regulations that have the binding effect of law. *See Nev. Rev. Stat. §§ 645.050, 645.190, and 645.630(9)*. (App. E, *infra*, pp. 20a-21a.)

jority vote the challenged rule amending section VII of the Rules and Regulations. The amended rule requires that a broker who uses a franchise name may not use a logotype, which in this case is a service mark, unless the broker's name occupies not less than fifty percent of the combined surface area. (The full text of the rule is set out at page 4, above.) In response to the challenges permitted under Nevada law, the Commission refused to set aside the rule, and identified the prevention of deception as the purpose of the regulation.⁷

B. Proceedings Below

On July 19, 1976, the appellants filed their complaint for injunctive relief against the enforcement of section VII(4) of the Rules and Regulations. The complaint alleged that the regulation violated the First and Fourteenth Amendments and the commerce and supremacy clauses of the Federal Constitution. Jurisdiction was based on 28 U.S.C. §§ 1331, 2281, and 2284 (1970).

Following the convening of a three-judge court, the appellees filed a motion for summary judgment as to all aspects of the case. The appellants also filed a motion for summary judgment, but solely on the grounds that the challenged regulation violated the First and Fourteenth Amendments. On April 12, 1978, the court below granted summary judgment in favor of the appellees on all issues. (App. A, *infra*, pp. 1a-9a.)

The appellants filed a motion for reconsideration contending that summary judgment was inappropriate

⁷ See Nev. Rev. Stat. §§ 233B.060 and 223B.100. (App. E, *infra*, pp. 17a-19a.) The Commission purported to act pursuant to Nevada Revised Statutes § 645.630(1). (App. E, *infra*, p. 21a.)

and that the court had not considered the appellants' contention that the Commission members were unconstitutionally biased. On June 28, 1978, the court below denied the motion for reconsideration (App. B, *infra*, pp. 10a-12a) and entered judgment for the appellees. (App. C, *infra*, p. 13a.)

THE QUESTIONS ARE SUBSTANTIAL

I

THE FIRST AMENDMENT

Nothing is so jealously safeguarded under our Constitution as the right to speak out clearly, effectively, and in the method of one's choosing. When state interests are so crucial as to require regulation restricting that fundamental right, the impingement must be no greater than necessary, and it must be the act of a neutral sovereign.

In granting summary judgment for the appellees, the court below failed to follow these guiding principles. As a result, its decision directly contravenes decisions of this Court and other tribunals. The question whether the 50:50 rule needlessly and unduly restricts the freedom to engage in and to receive commercial speech involves issues under the First Amendment that are novel, explicitly reserved by prior decisions of this Court, and of broad importance.⁸

⁸ Both the appellants and the appellees filed motions for summary judgment in the court below. Consequently, this issue is presented in two aspects:

1. The appellants contend that the court could not properly grant summary judgment in favor of the appellees both as a matter of law, and because the appellees did not, in their motion papers, sustain the burden which was on them to show that there

A. The Decision Below Is in Conflict with Decisions of the District of Columbia and Third Circuits and of Another Three-Judge District Court

The court below explicitly refused to consider whether less restrictive alternatives were available so that First Amendment guarantees would not be needlessly sacrificed in the name of state regulation. (App. A, *infra*, pp. 4a-5a.) This decision is in conflict with holdings of the United States Court of Appeals for the District of Columbia Circuit and the Third Circuit, and is also contrary to the decision of a three-judge district court for the Western District of Washington.

In *United States v. National Society of Professional Engineers*, 555 F.2d 978 (D.C. Cir.), *aff'd*, April 25, 1978, No. 76-1767, the court of appeals when dealing with commercial speech held, "Any such regulation by the state should not be more intrusive than necessary to achieve fulfillment of the governmental interest." 555 F.2d at 984. Similarly, in *Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983, the Third Circuit stated clearly that "a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of the deception." 542 F.2d at 620. *Accord*, *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950; *Anderson, Clayton & Co. v. Washington State Dep't of Agric.*, 402 F. Supp. 1253 (W.D. Wash. 1975) (three-judge court).

were appropriate and sufficient grounds to meet the burden which the regulation imposes on freedom of commercial speech.

2. The appellants also contend that, as a matter of law, and on the uncontroverted facts in the record, the motion for summary judgment in favor of the appellants should have been granted.

It is clear that the regulation in issue is unduly restrictive. Subpart (c) of the regulation, which is not challenged here, and the Century 21 franchise agreement both require the local broker to disclose conspicuously that the real estate office is independently owned and operated. Thus, any asserted state interest is adequately met without the additional requirement of a 50:50 ratio.⁹ *Cf. Jacob Siegel Co. v. FTC*, 327 U.S. 608; *FTC v. Royal Milling Co.*, 288 U.S. 212 (FTC must formulate less drastic remedy than excision of trade name if possible). Moreover, even assuming that the state has a legitimate interest in insuring that a local broker's name is large enough to be noticed,¹⁰ it is the absolute size of the broker's name, rather than its comparative size, that is of central significance. The holding of the court below that a "least restrictive alternative" analysis is irrelevant when commercial speech is regulated in the circumstances of this case (App. A, *infra*, pp. 4a-5a) raises an important issue which should be reviewed by this Court.

B. The Court Below Utilized a Standard of Review in Conflict with Applicable Decisions of This Court

The court below, when analyzing the First Amendment claims of the appellants, adopted "reasonable-

⁹ There was direct evidence to this effect in the record before the court below. Moreover, Section VII(2)(a) of the Rules and Regulations of the Commission (App. E, *infra*, p. 22a) adequately meets any asserted state interest without the additional requirement of a 50:50 ratio by requiring the use of the broker's name in advertising.

¹⁰ Appellants contend that the 50:50 rule has no logical relationship with the desired result, i.e., informing the public of the fact that the broker operates independently. See *infra* at 17-18.

ness" as its standard of review. Although the court did not elucidate how that standard was to be applied, its use in the present case approximated the "rational basis" analysis of Fourteenth Amendment cases. See generally *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307. The adoption of this standard was in conflict with the applicable decisions of this Court.

The court below drew unwarranted conclusions from statements made in recent opinions of this Court relating to the regulation of commercial speech. The cases relied upon were *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748; *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, and *Bates v. State Bar of Arizona*, 433 U.S. 350. Each of these cases, however, carefully balanced the competing public and private interests. The simple recitation of a rational state interest did not end this Court's inquiry because fundamental private interests were at stake. In the present case, however, the court below failed to consider the important private interests sacrificed by the 50:50 rule and prevented their full development by granting a summary judgment.

Virginia Pharmacy Board, *Linmark*, and *Bates* all dealt with total proscriptions of commercial speech. See also *Carey v. Population Services Int'l*, 431 U.S. 678; *Rogers v. Friedman*, 438 F. Supp. 428 (E.D. Tex. 1977) (three-judge court), *prob. juris. noted*, April 17, 1978, No. 77-1163. Since the decision of the court below, however, this Court has decided *Ohralik v. Ohio State Bar Association*, May 30, 1978, No. 76-1650. *Ohralik* shows that a balancing of the state and private interests must be conducted in all cases involving the regulation of commercial speech, whether that reg-

ulation amounts to a total or only a partial proscription. See also *Linmark*. Moreover, *Ohralik* makes clear that only *important* state interests will be sufficient to validate the regulation of commercial speech.¹¹ 98 S. Ct. at 1920. Thus, by neglecting to engage in an appropriate weighing of the governmental and private interests, the court below acted in conflict with the applicable decisions of this Court.

C. The Balancing of Private and State Interests Was Explicitly Reserved in Linmark—in This Case the Private Interests Predominate

A careful analysis of the private and governmental interests at stake in this case will demonstrate that the private interests predominate. It was precisely this balancing of interests that was explicitly reserved in *Linmark*.¹² The question is substantial and requires plenary consideration by this Court.

On the one hand, the private interests are impressive. The use of the "CENTURY 21" service mark by all of the appellants is a legitimate competitive advantage specifically sanctioned by federal trademark law. They have willingly entered into contractual agree-

¹¹ Although the court below characterized as "important" the state's interest in ensuring that the public knows it is doing business with a local, rather than a national, company, this proposition is hardly free from doubt. See note 13, *infra*. Indeed, the appellants contend that this purpose, which is the only purpose acknowledged by the appellees, is illegitimate in that it is a thinly veiled attempt to favor local interests to the detriment of interstate commerce. See *infra* at pp. 15, 17.

¹² "Laws dealing with false or misleading signs . . . would raise very different constitutional questions. We leave those questions for another day . . ." 431 U.S. at 98.

ments to communicate their honest message in the marketplace in the way they think most effective. Moreover, the appellants are a vehicle through which consumers of realty are aided in their right to receive relevant communications. See *Linmark*, 431 U.S. at 92; *Virginia Pharmacy Bd.*, 425 U.S. at 763-65. For such consumers, much more than merely economic factors is relevant. Selection of a home also involves social and aesthetic factors, and often educational (schools serving the area) and political (such as a desire to live in an integrated neighborhood) considerations as well. As a result, the relevant private interests are close to the core of First Amendment protections.

On the other hand, the only state interest that Nevada asserts to be furthered by the 50:50 rule—the prevention of deception—cannot survive scrutiny. In the first place, Nevada's own chief legal officer has ruled that "[n]o viable argument can be made that a broker who did business using the trade name 'Century 21' would be making a misstatement of fact, or that he would be presenting as true that which was false."¹³

¹³ Even if it is conceded that the state has an interest in informing the public of the franchisee/franchisor relationship, that interest cannot be considered substantial or important in light of the multiplicity of 100:0 logos commonly displayed, e.g., Texaco service stations, Hilton hotels, and McDonald's restaurants. Franchising sales of goods and services in more than 463,000 outlets, employing 3.5 million people, were expected to exceed \$238 billion in 1977, accounting for one-third of all retail sales in the United States. U.S. Dept. of Commerce, *Franchising in the Economy, 1975-1977*, pp. 1-2 (1976). Such sales are often made with little or no reference to a local dealer. Cf. a Coca-Cola can. It cannot be contended that this volume of business is founded on a deception. The record in this case is devoid of any evidence that any person was confused, deceived, or harmed by any sign or other advertising when the public dealt with a franchised real estate broker.

Secondly, the "deception" alleged is that the general public will believe that it is dealing with a national, rather than a local, concern. This type of open prejudice against interstate commerce should not be countenanced under our constitutional system.¹⁴

Moreover, the general public is not in a position to be harmed, even if "misled". Only realty buyers and sellers, the true consuming public, see *Linmark*, 431 U.S. at 92, are in even potential danger of "deception," and they are not left in the dark as to the broker's identity. The buyer or seller of real estate who utilizes the services of a franchised real estate agent has first hand knowledge of the individual or establishment he hires to buy or sell his home. See Rules and Regulations of the Commission § VII(2)(a) (App. E, *infra*, p. 22a). He may, indeed, select a particular broker in order to have the "CENTURY 21" service mark displayed as advantageously as possible, because he believes that the use of the "CENTURY 21" service mark will attract buyers, and because he knows that Century 21 brokers are well trained and maintain high standards. It is incongruous for Nevada to "protect" the home owner in such a way that he must forfeit his right to speak effectively in the marketplace. This is the sort of paternalistic regulation that was held invalid in *Virginia Pharmacy Board*, 425 U.S. at 770. Cf. *Pittsburgh Press Co. v. Pennsylvania*, 31 Pa. Commonw. Ct. 218, 376 A.2d 263 (1977) (First Amendment right to engage in most efficacious commercial speech possible).

¹⁴ The state has ample opportunity through its long-arm statute, Nev. Rev. Stat. § 14.065 (App. E, *infra*, pp. 16a-17a) to obtain jurisdiction in Nevada over an out-of-state franchisor doing business in the state.

In sum, when the relevant private and public interests are balanced, a responsibility which the court below failed to fulfill, the private interests clearly predominate. This conclusion follows *a fortiori* from *Linmark* where the asserted interest of the establishment of stable and integrated neighborhoods was found wanting. Here, as in *Linmark*, 433 U.S. at 94-97, the state has not demonstrated that the regulation will further the public interest that it has asserted.¹⁶ On such a record the court below could not properly grant summary judgment for the appellees. Instead, it should have granted summary judgment for the appellant.

II

THE FOURTEENTH AMENDMENT

A. No Rational Basis or Legitimate State Interest Exists to Uphold the 50:50 Rule

State regulation can only be upheld under the Fourteenth Amendment if it seeks to promote legitimate state interests in a rational manner. *Jimenez v. Weinberger*, 417 U.S. 628; *Dandridge v. Williams*, 397 U.S. 471; *Shapiro v. Thompson*, 394 U.S. 618; *Shelton v. Tucker*, 364 U.S. 479. Nevada's 50:50 rule neither promotes a legitimate state interest nor furthers the only basis alleged by the state for its promulgation. As a result, it imposes a restraint on the appellants which is

¹⁶ The court below also ignored relevant decisions of this Court when it held that a hearing was not necessary to determine whether there was in fact actual harm. When First Amendment freedoms are abridged by government regulation, this Court has often held that an independent analysis must be made to establish whether the harm contemplated by the regulation was in fact present in the individual case. *In re Primus*, May 30, 1978, No. 77-56; *Time, Inc. v. Page*, 401 U.S. 279. See generally Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518 (1970).

simply arbitrary and cannot be justified under the Fourteenth Amendment.¹⁶

Obviously, Nevada has a valid interest in protecting its populace from deceptive advertising. The "deception" in issue in this case, however, is whether the public is misled as to the ownership of a franchised real estate office, *i.e.*, whether it is a local or a national concern. The same services would be provided by the brokerage office, regardless of whether it is incorporated in Nevada or in a sister state. Thus, the purpose of the regulation is clear on its face—the Commission was seeking to protect local brokers who did not affiliate with a nationally known franchisor from those who did by lessening the impact of the national trade name and thereby depriving the franchisee of a legitimate competitive advantage.¹⁷

Even if it were assumed that the state interest asserted is legitimate, the means adopted do not rationally relate to that purpose. The record contains expert testimony to the effect that the 50:50 rule in no way informs the public as to the legal relationship between

¹⁶ Here, again, the question is before the Court in two aspects: (1) the court below could not properly grant summary judgment on this record in favor of the appellees, and (2) the court should have granted the motion for summary judgment filed by the appellants.

¹⁷ Although this purpose is apparent from the face of the regulation, the appellants also argue in part IIC *infra* that the granting of summary judgment prevented them from adequately presenting evidence to show the bias of the members of the Commission and the events leading up to the promulgation of the regulation.

the franchisor and the franchisee.¹⁸ As a result, a substantial question is presented with regard to whether the regulation violates the due process clause of the Fourteenth Amendment.

B. The Conclusive Presumption Established by the Regulation Violates Due Process

The 50:50 rule amounts to a conclusive presumption that the use of a sign on which the franchisor's trade name is larger than that of the local broker is deceptive. For the reasons stated above, such an assumption is irrational. At the very least, the assumption is not invariably true. As a result, it runs afoul of those cases striking down legislative conclusive presumptions under the Fifth and Fourteenth Amendments. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632; *United States Dept. of Agric. v. Murry*, 413 U.S. 508; *Vlandis v. Kline*, 412 U.S. 441; *Stanley v. Illinois*, 405 U.S. 645.¹⁹

In *Weinberger v. Salfi*, 422 U.S. 749, this Court re-examined the conclusive presumption doctrine and checked a tendency of some lower courts to utilize the theory beyond its proper limits. This Court noted, however, that the theory was still appropriate in cases in-

¹⁸ The members of the Commission stated in affidavits in the record that they promulgated the 50:50 rule in order to prevent the public from being "deceived" as to the ownership of the brokerage office. These statements, however, give no evidence that there were in fact any deceptions. The appellees in response to request for admissions stated that they could neither admit nor deny the statements that 1) the 50:50 rule does not prevent deception and (2) the 5:1 ratio is deceptive.

¹⁹ Appellants also contend that the challenged regulations violate the equal protection clause of the Fourteenth Amendment. See *Dunn v. Blumstein*, 405 U.S. 330.

volving "constitutionally protected status". 422 U.S. at 772; see, e.g., *LaFleur*; *Stanley*. This is such a case, for the 50:50 rule abridges the appellants' freedom to speak as they so desire. Moreover, the challenged regulation restricts the public's First Amendment right to receive information. The question whether the conclusive presumption of the challenged regulation passes constitutional muster merits review by this Court.

C. The Bias of the Commission Members Makes the Regulation Invalid Under the Due Process Clause

It is the essence of due process that "a state cannot affect a person's personal and property rights except after a hearing before a fair and impartial tribunal." *Wall v. American Optometric Ass'n, Inc.*, 379 F.Supp. 175, 188 (N.D. Ga.) (three-judge court), *aff'd*, 419 U.S. 888, citing *Fuentes v. Shevin*, 407 U.S. 67; *In re Murchison*, 349 U.S. 133; *Berger v. United States*, 255 U.S. 22. In both trials and administrative hearings, this requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case. *Gibson v. Berryhill*, 411 U.S. 564; *Tumey v. Ohio*, 273 U.S. 510; *Wall, supra*.

In this case the appellants alleged that the members of the Commission were impermissibly biased against them in violation of the due process clause of the Fourteenth Amendment. In support of this allegation, the record included evidence, *inter alia*, that the Commission members are in direct economic competition with appellant Barrett; that the Nevada Association of Realtors is in direct competition with appellants Century 21, Century 21 of Arizona, and Southern Nevada; that all of the Commission members are selected from the membership of the Nevada Association of Real-

tors;²⁰ that the Nevada Association of Realtors appeared before the Commission and actively opposed the entrance of Century 21 into the Nevada real estate market; and that the 50:50 rule was promulgated as a concession to the Nevada Association of Realtors. As a result, summary judgment for the appellees was inappropriate because material facts were in issue concerning the bias of the Commission.²¹

²⁰ Nevada Revised Statutes § 645.050(1) provides that the Governor when selecting the membership of the Commission "shall obtain and consider a list of nominees from the Nevada Association of Realtors." See App. E, *infra*, p. 20a for full text.

²¹ Only the appellees sought summary judgment with regard to this issue before the lower court.

The bias issue was not discussed by the court below in its original opinion. (App. A, *infra*, pp. 1a-9a.) In its denial of the appellants' motion for reconsideration (App. B, *infra*, pp. 10a-12a), the court did deal with this issue, disposing of it by asserting that the appellants' challenge is to the bias of the Commission members in their legislative, as opposed to their adjudicative, capacity. The appellants, however, contended below and still contend that the Commission members are unconstitutionally biased when acting in either capacity. See H. Linde, *Due Process of Law-making*, 55 Neb. L. Rev. 197, 249-250 (1976); F. Cooper, *State Administrative Law* 345-346 (1965). The fact that bias among some members of a legislature does not invalidate legislation does not support the adoption of a regulation by a commission when all the members of the commission are biased. *Cf. Gibson v. Berryhill*, 411 U.S. 564.

In any event, the dismissal of the adjudicatory bias claim was improper because the issue is ripe for decision. Appellant Barrett alleged in the Complaint for Injunction that he is under imminent threat of enforcement of the 50:50 rule. The Commission so admitted in the Answer to Complaint for Injunction. Violation of the regulation is a criminal offense under Nevada Revised Statutes §§ 645.850(1), 190.120, and 193.140. (App. E, *infra*, pp. 17a and 21a.) As a result, the controversy should be heard by the court below. See *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52; *Steffel v. Thompson*, 415 U.S. 452; *Abbott Laboratories v. Gardner*, 387 U.S. 136. See generally K. Davis, *Administrative Law of the Seventies* § 21.05 (1976).

III

THE LANHAM ACT AND PREEMPTION

The decision of the court below that the regulation is not preempted by the Lanham Act, 15 U.S.C. §§ 1051 *et seq.* (1970), raises an important issue which should be reviewed by this Court. The court below ended its analysis when it determined that the 50:50 rule and the Act had a complementary purpose—to prevent the deceptive use of service marks. (App. A, *infra*, p. 7a.) This approach was explicitly rejected in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132.

In *Paul*, this Court stated that the proper test to determine whether federal preemption has occurred is "whether both regulations can be enforced without impairing federal superintendence of the field, *not whether they are aimed at similar or different objectives.*" 373 U.S. at 142 (emphasis added). See also *Jones v. Rath Packing Co.*, 430 U.S. 519; *De Canes v. Bica*, 424 U.S. 351. When the proper test is applied, it is apparent that the 50:50 rule has been preempted by the Lanham Act to the extent that it undertakes to regulate federal service marks.

Congress in section 45 of the Act, 15 U.S.C. § 1127 (1970), made its intent explicit:

The intent of this chapter is to regulate commerce within the control of Congress *by making actionable the deceptive and misleading use of marks in such commerce; [and] to protect registered marks used in such commerce from interference by State, or territorial legislation . . .* (Emphasis supplied.)

The 50:50 rule encroaches on this ground cordoned off by Congress because it dilutes the CENTURY 21 serv-

ice mark and makes a conclusive, legislative-type finding that the use of a federally registered service mark is deceptive and misleading.

In the first place, it is clear that the 50:50 rule dilutes the efficacy of the "CENTURY 21" service mark in its customary 5 to 1 ratio.²² There is uncontroverted expert testimony to this effect in the record.²³ The very case relied upon almost exclusively by the lower court, *Mariniello v. Shell Oil Co.*, 511 F.2d 853 (3rd Cir. 1975), acknowledges that state regulation which dilutes federally registered marks is preempted by the Lanham Act. 511 F.2d at 858. See also *Mister Donut of America, Inc. v. Mr. Donut, Inc.*, 418 F.2d 838 (9th Cir. 1969); *Burger King of Florida, Inc. v. Hoots*, 403 F.2d 904 (7th Cir. 1968).

The regulation of the deceptive or misleading use of service marks is also preempted by the Lanham Act. Section 43 of the Act, 15 U.S.C. § 1125 (1970), establishes a civil action for "any false description or representation, including words or other symbols tending falsely to describe or represent the same" Moreover, the Act deals extensively with the regulation of

²² Copies of the registered service marks of appellant Century 21 are reproduced in Appendix F, *infra*, pp. 22a-24a.

²³ The court below stated that "the regulation does not in any manner dilute the Lanham Act's protection of registered trademarks against unlawful use by others." (App. A, *infra*, p. 7a.) This may be correct, but it is also irrelevant. The question here is interference with effective use of the mark by the appellants. The court ignored the Act's central purpose of preventing "interference" with registered marks by "state or territorial legislation." 15 U.S.C. § 1127 (1970).

false or misleading trademark and service mark usage.²⁴ As a result, state regulation in this area cannot stand because it impairs "federal superintendence of the field." *Paul*, 373 U.S. at 142; see *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1279 (5th Cir. 1978).

IV

COMMERCE CLAUSE

The 50:50 Rule Unconstitutionally Burdens Interstate Commerce—It Was Wrong to Decide This Issue by Summary Judgment

Adjudication [of whether state regulation unconstitutionally burdens interstate commerce] entails "emphasis upon the concrete elements of the situation that concerns both state and national interests. The particularities of a local statute touch its special aims and the scope of their fulfillment, the difficulties which it seeks to adjust, the price at which it does so. . . . [P]ractical considerations, however screened by doctrine, underlie resolution of conflicts between state and national power." *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 372 n.6, quoting Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* 33-34 (1937).

²⁴ See, e.g., 15 U.S.C. § 1052(a) (registration refused if deceptive or falsely suggests personal relationship); *id.* (d) (registration refused if deceptive in relation to another mark); *id.* (e) (registration refused if deceptively misdescriptive of goods); *id.* § 1053 (registration of service marks refused if deceptive); *id.* § 1054 (registration of collective and certification marks refused if deceptive); *id.* § 1055 (mark inures to benefit of registrant unless used to deceive the public); *id.* § 1064(e) (petition to cancel mark may be based on its deceptive use); *id.* § 1065 (mark not incontestable if used to misrepresent goods); *id.* § 1091 (slogans, etc., not registrable if deceptive); *id.* § 1115(b)(3) (incontestable mark

This quotation recites a common theme of the decisions of this Court—a detailed factual analysis is required to balance the state and national interests involved when it is alleged that state regulation unconstitutionally burdens interstate commerce. *See, e.g., Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440-41; *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333; *Pike v. Bruce Church, Inc.*, 397 U.S. 137; *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520.²⁵ In contrast, the court below “balanced” the competing state and national interests before a full evidentiary hearing had been held.²⁶ Appellants set out in the margin some of the many issues of material fact that were not addressed by the court below.²⁷ Moreover, the court

conclusive evidence of exclusive right to its use unless used to misrepresent goods or services); *id.* § 1120 (civil action established to remedy registration procured by fraud).

²⁵ In the *Bibb* case, this Court said, “Like any local law that conflicts with federal regulatory measures, state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must also bow.” 359 U.S. at 529; citations omitted.

²⁶ The appellants did not request summary judgment with respect to the commerce clause issue. Questions under the commerce clause were presented to the court below, including many genuine issues of material fact which are in dispute.

²⁷ The following is a recitation of some of the factual issues found relevant in only four recent decisions of this Court—*Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429; *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333; *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366; and *Pike v. Bruce Church, Inc.*, 397 U.S. 137. These issues are also facts of relevance in the instant appeal and many were specifically raised for consideration in the appellants’ motion for reconsideration. The

below gave no consideration to the anti-competitive effect of the Commission’s rule, an effect that is contrary to the policies established by Congress under the

court below refused to set its summary judgment aside even though it lacked evidence on any of these issues:

- (1) Effect of the regulation on interstate commerce. *Raymond Motor Transp.; Hunt; Cottrell; Pike.*
- (2) Disruption of plaintiffs’ operations. *Raymond Motor Transp.; Hunt; Cottrell; Pike.*
- (3) Past investments and costs of plaintiffs. *Cottrell; Pike.*
- (4) Additional present costs caused plaintiffs due to the challenged regulation. *Raymond Motor Transp.; Hunt; Pike.*
- (5) Whether plaintiff is stripped of “competitive and economic advantages it has earned for itself.” *Hunt.*
- (6) Local benefits engendered by the regulation. *Raymond Motor Transp.; Hunt; Cottrell; Pike.*
- (7) Legitimacy of the local interest asserted. *Hunt; Cottrell; Pike.*
- (8) Whether the regulation furthers its purported purpose. *Raymond Motor Transp.*
- (9) Whether the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. *Raymond Motor Transp.; Pike.*
- (10) Whether local interests could be promoted as well by alternatives with a lesser impact on interstate activities. *Cottrell; Pike.*
- (11) Whether the regulation, although neutral on its face, was enacted at the instance of and primarily for the benefit of local concerns. *Raymond Motor Transp.; Hunt.*
- (12) Whether the regulation is a compromise between national and local interests. *Raymond Motor Transp.*
- (13) Whether consumers would only be “deceived” or “confused” to their benefit. *Hunt.*
- (14) Similar regulations of sister states. *Raymond Motor Transp.*
- (15) Possibility that other states would follow the lead of the state which promulgated the challenged regulation. *Hunt.*

commerce clause."²⁸ Summary judgment improperly foreclosed the opportunity to develop a full record on these issues relating to the burden which the Commission's 50:50 rule imposes on interstate commerce.

CONCLUSION

The issues presented by this appeal are substantial and merit plenary consideration by this Court. Probable jurisdiction should be noted.

Respectfully submitted,

ERWIN N. GRISWOLD
FREDERICK W. CLAYBROOK, JR.

Attorneys for Appellant

Of Counsel:

JONES, DAY, REAVIS & POGUE
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

JOHN P. MORAVEK, ESQ.
Vice President and Counsel
Century 21 Real Estate Corp.
18872 MacArthur Blvd.
Irvine, California 92715

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²⁸ "[T]he freedom guaranteed each and every business [by the legislation enacted by Congress under the commerce clause], no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610.

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-76-136 BRT

CENTURY 21 REAL ESTATE CORPORATION, a California corporation; CENTURY 21 REAL ESTATE OF ARIZONA, INC., an Arizona corporation; SOUTHERN NEVADA FRANCHISE SERVICE Co., INC., a Nevada corporation; and ROBERT E. BARRETT, and BARRETT & Co., INC. REALTORS, a Nevada corporation,

Plaintiffs,

vs.

THE NEVADA REAL ESTATE ADVISORY COMMISSION; ROBERT W. HASS, ELIZABETH M. KROLAK, FRED M. SCHULTZ, OLIVIA D. SILVAGNI and CARL F. FUETSCH, members thereof; and ANGUS W. McLEOD, Administrator of the Nevada Real Estate Division,

Defendants.

Opinion

Filed April 12, 1978

Before: MERRILL, Circuit Judge, FOLEY and THOMPSON,
District Judges

THOMPSON, District Judge:

A three-judge court has been convened to determine the validity of a regulation of the Nevada Real Estate Advisory Commission requiring franchised brokers to display their names as prominently as their franchisors' in all advertisements. We sustain the regulation against the plaintiffs' constitutional attack. This holding rests on negative answers to the following principal questions: (1) Whether the imposition of a 50:50 advertising ratio violates the First

Amendment; (2) Whether it creates a conclusive presumption that any other ration [sic] is misleading in derogation of the due process and equal protection clauses of the Fourteenth Amendment; (3) Whether it impermissibly dilutes a service mark protected by the Lanham Act; and (4) Whether it places an undue burden on interstate commerce.

Century 21 Real Estate Corporation, a plaintiff in this action, is a nationally recognized franchisor of real estate brokerage firms. Its subsidiaries, plaintiffs Century 21 Real Estate of Arizona, Inc. and Southern Nevada Franchise Service Co., enjoy the right to market the Century 21 franchise package in the State of Nevada. Plaintiff Robert Barrett is a Nevada realtor and a franchisee of Century 21.

Over the past decade, Century 21 has staged a nationwide campaign to promote its service mark, a modern building logo bordered on top with the words "Century 21." This service mark occupies 80% of the surface area of any given display. The remaining 20% is reserved, in the general promotional materials, for filler messages such as "real estate" or for the insertion of the franchisee's name, like "ABC Realty." This ratio runs afoul of that mandated by section VII of the Rules and Regulations of the Nevada Real Estate Advisory Commission, which reads as follows:

"(4) Any broker who operates under or uses a franchise name shall:

.

(b) incorporate in the franchise name and logotype his own name; however, the broker's name may not be less than 50 percent of the surface area of the entire combined area of both the broker's name and the trade name or logotype. . . ."

The plaintiffs ask that this regulation be declared invalid and that an injunction enter in their favor against its enforcement.

(1) *The First Amendment.*

The plaintiffs premise their First Amendment claim on the general proposition that commercial speech merits constitutional protection. *Virginia State Bd. of Pharmacy v. Citizens' Cons. Council, Inc.*, 425 U.S. 743 (1976). Equating commercial speech with other types of protected speech, the plaintiffs reason that only a "significant" or "compelling" state interest will justify its regulation and that, even then, the regulation must be the "least restrictive" of the alternatives the state might adopt in accomplishing its end. Cf. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975). It is conceded that the state's interest in keeping false or misleading advertising from consumers is substantial. *Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93-4 (1977). The vice in the regulation under attack here, it is argued, is that it sweeps too broadly, proscribing advertisements that might, after a hearing on the merits, prove neither false nor misleading.

To date the Supreme Court has, in a First Amendment context, dealt only with challenges to laws that work a "blanket," "total" or "complete" suppression of commercial speech. *Bates v. State Bar of Arizona*, 433 U.S. at 383; *Carey v. Population Serv. Int'l*, 431 U.S. 678, 702 (1977); *Virginia State Bd. of Pharmacy v. Citizens' Cons. Council, Inc.*, 425 U.S. at 772 n. 24. See *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. at 92. The regulation at issue here, by contrast, does not suppress any speech; it merely requires that the franchisee's independent status be proclaimed in tones as loud as those used to advertise the franchisor-franchisee relationship. Nothing in the regulation prevents Century 21 from preserving the visual impact of its 80:20 format by using filler messages, as it in fact does in its general advertisements, to take up the space ordinarily used to display the franchisee's name. The regulation simply requires Century 21 to go further and give

as much space to the franchisee as it gives its own logo-type. With this and other possible accommodations in mind, we doubt that the regulation at issue here abridges any First Amendment freedoms. See *Banzhaf v. FCC*, 405 F.2d 1082, 1101-03 (D.C.Cir. 1968), *cert. denied* sub nom. *Tobacco Inst., Inc. v. FCC*, 396 U.S. 842 (1969), quoted with approval in *Virginia State Bd. of Pharmacy v. Citizens' Cons. Council, Inc.*, 425 U.S. at 772 n. 24.

In traditional doctrinal terms, the only First Amendment argument against this regulation is that it may have a "chilling effect" on franchisors, making them reluctant to go to the trouble and expense of designing special layouts which will comply with the 50:50 rule. Perhaps more important than the advertiser's right to express himself, however, is the consumers' right to receive information. See *Virginia State Bd. of Pharmacy v. Citizens' Cons. Council*, 425 U.S. at 756-57 (consumer standing to challenge prohibition on prescription price advertising). Because of its greater durability, commercial speech deserves less latitude than other kinds:

"Since advertising is the *sine qua non* of commercial profits, there is little likelihood of it being chilled by proper regulation and foregone entirely.

"Attributes such as . . . the greater objectivity and hardiness of commercial speech, may make it . . . appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. They may also make inapplicable the prohibition against prior restraints."

Id. at 772 n. 24 (citations omitted). Indeed, the plaintiffs here do not allege that the regulation makes it infeasible to advertise in Nevada; they complain only that it makes it more expensive. We cannot agree that a least restrictive alternative applies to regulations which are designed to

combat misleading or deceptive practices and which in no way threaten the commercial message with complete or total suppression.¹ Judged by a reasonableness standard, the 50:50 rule constitutes a legitimate means to the legitimate and important end of ensuring that the public realizes it is doing business with an independent broker and not a national firm when it buys or sells real estate in Nevada.

(2) Conclusive Presumption.

Citing *Cleveland Board of Education v. La. Fleur*, 412 U.S. 632 (1974) and *Vlandis v. Kline*, 412 U.S. 441 (1973), the plaintiffs find additional fault with the regulation in that it creates a conclusive presumption that advertisements employing anything other than a 50:50 ratio are misleading. Although its contours remain uncertain, the conclusive presumption doctrine has been curtailed in recent decisions. See *Weinberger v. Salfi*, 422 U.S. 749 (1975). See, also, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976); Note, The Burger Court's "Newest" Equal Protection: Irrebuttable Presumption Doctrine Rejected,

¹ "But the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. As was acknowledged in *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S., at 771 n. 24, there are 'commonsense differences' between commercial speech and other varieties. See also *id.*, at 775-781 (concurring opinion). Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. See *id.*, at 722-723, n. 24. Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected. *Ibid.* Since overbreadth has been described by this Court as 'strong medicine,' which 'has been employed . . . sparingly and only as a last resort,' *Broadrick v. Oklahoma*, 413 U.S., at 613, we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective. Cf. *Bigelow v. Virginia*, 421 U.S., at 817-818." *Bates v. State Bar of Arizona*, 433 U.S. at 380-81.

1977 Wash. U.L.Q. 140 (1977). To the extent that it has been assimilated to a "fundamental rights" analysis, cf. *Weinberger v. Salfi*, 422 at 771-73, it seems doubtful that the conclusive presumption doctrine adds anything to the precepts of the First Amendment. We have concluded, *supra*, that the First Amendment tolerates the regulation at issue here. Having lost the first round, the plaintiffs cannot resort to the Due Process and Equal Protection clauses to parlay into constitutional principle the claim that their First Amendment freedoms require the State to pursue the least restrictive alternative open to it and hold a hearing in every case.

(3) *The Lanham Act.*

The Lanham Act establishes a nationwide system for the registration of trademarks used in interstate commerce. 15 U.S.C. §§ 1051 et seq. The modern building logo, with the words "Century 21" arranged around it, is protected by the Act. A patent is pending on the use of the Century 21 service mark in the customary 80:20 ratio. The 50:50 rule threatens to dilute the mark, it is argued, and could lead to a finding that it has been abandoned. The plaintiffs thus voice the additional objection that the Nevada Real Estate Advisory Commission regulation violates the Supremacy Clause of the Constitution.

In recent times, the Supremacy Clause has seldom been used to strike down state law:

"[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained."

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). See *DeCanas v. Bica*, 424 U.S. 351 (1976). The

Lanham Act contains no manifestation of a Congressional intent comprehensively to control all aspects of the trademark field. *Mariniello v. Shell Oil Co.*, 511 F.2d 853, 857 (3rd Cir. 1975). Nor are we convinced that the state regulation at issue here collides with any of its policies or provisions.

The Senate Report accompanying the Lanham Act reveals that its purpose was two-fold: first, to ensure that the public gets what it thinks it is getting when it buys a name brand; and second, to protect trademark holders from pirates and cheats. See S.Rep. No. 1333, 79th Cong., 2d Sess. (1946). To the extent the state regulation is aimed at preventing deception, it comports with the first of these policies, Cf. 15 U.S.C. § 1055, and the regulation does not in any manner dilute the Lanham Act's protection of registered trademarks against unlawful use by others. Relying on *Mariniello v. Shell Oil Co.*, *supra*, we sustain the rule against the plaintiffs' Supremacy Clause challenge. See also: *Wiener King, Inc. v. Winer [sic] King Corp.*, 407 F. Supp. 1274 (D.N.J. 1976).

(4) *Interference With Interstate Commerce.*

In their moving papers the plaintiffs press the final argument that the regulation results in an impermissible interference with interstate commerce. At the outset, we note our difficulty in perceiving what, if any, burden the regulation actually imposes on interstate commerce since it is directed principally at the local level, affecting only intrastate advertisements. Cf. *Head v. New Mexico Bd. of Examiners in Optometry*, 373 U.S. 424, 447 (1963) (Brennan, J. concurring); *TV, Pix, Inc. v. Taylor*, 304 F.Supp. 459, 463 (D.Nev. 1968), aff'd 396 U.S. 556 (1970). It is true that Century 21 prepares placards, advertisements and television commercials for nationwide distribution and that the Century 21 mark derives federal protection from the Lanham Act. But the Nevada regulation does not impede the interstate transportation of goods through particular

states, see *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), nor does it discriminate against interstate commerce, requiring the national franchisors to forebear advertising in Nevada or otherwise lose the advantages that inure to a franchised broker, see *Hunt v. Washington State Apple Advert. Comm'n.*, 432 U.S. 333, 351 (1977). Combating fraudulent or deceptive advertising in the real estate brokerage business is a matter of extensive state regulation, see ch. 645 of NRS, and peculiarly local concern. See, e.g., *Riley v. Chambers*, 185 P. 855 (Cal. 1919). The regulation is appropriately aimed at providing consumers with more, not less, information. See *Hunt v. Washington State Apple Advert. Comm'n.*, 432 U.S. at 353. Whatever incidental burden on interstate commerce may exist, we conclude that it is slight in comparison with the weighty state interest Nevada has in ensuring that its citizens realize that they must look to the local broker and not the franchisor for recompense in the event they are defrauded in a real estate transaction.

This balancing test to judge the validity of state laws and regulations vis-a-vis the commerce clause was recently reaffirmed in *Raymond Motor Trans., Inc., v. Rice*, 434 U.S. 429, 440-441.

"In this process of 'delicate adjustment,' the Court has employed various tests to express the distinction between permissible and impermissible impact upon interstate commerce, but experience teaches that no single conceptual approach identifies all of the factors that may bear on a particular case. Our recent decisions make clear that the inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." . . .

In consideration of the premises,

IT HEREBY IS ORDERED that plaintiffs' motion for summary judgment be, and it hereby is, denied.

IT IS FURTHER ORDERED that defendants' motion for summary judgment be, and it hereby is, granted.

I certify that all members of the Court have concurred in the foregoing opinion and orders.

DATED April 12, 1978.

/s/ BRUCE R. THOMPSON
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

CENTURY 21 REAL ESTATE CORPORATION, et al.,
Plaintiffs,

vs.

THE NEVADA REAL ESTATE ADVISORY COMMISSION, et al.,
Defendants.

Civil No. 76-136 BRT

Order

Pursuant to Rule 59(e), Fed.R.Civ.P., the plaintiffs have timely moved this Court to reconsider its order, dated April 12, 1978, granting summary judgment in favor of the defendants. They advance a number of arguments in support of their motion. Simply stated, however, these arguments comprise two basic attacks on the judgment: (1) that there exist material issues of disputed fact which preclude the grant of summary judgment; and (2) that this Court failed to resolve all claims for relief, rendering the judgment interlocutory and non-appealable unless certified under Rule 54, Fed.R.Civ.P.

The record in this case was very complete, consisting of numerous depositions, affidavits, exhibits and interrogatories. In reviewing them, this Court has been mindful of its obligation to avoid deciding constitutional and other questions of a large public import on an inadequate factual basis. See 6 Pt. 2 Moore's Federal Practice ¶ 56.17 [10] (2d ed. 1976). However, "the existence of an important, difficult or complicated question of law, where there is no genuine issue of material fact, is not a bar to a summary judgment." *Id.* at ¶ 56.16, p. 56-661 (footnote omitted). Having reread the record in passing on the plaintiffs' mo-

tion, this Court remains convinced that there exist no *material* issues of fact to preclude summary judgment.

For the purpose of placing at rest plaintiffs' complaint that our first opinion did not dispose of all claims for relief, the opinion filed April 12, 1978, is hereby amended to add the following:

The plaintiffs also argue on the basis of *Gibson v. Berryhill*, 411 U.S. 564 (1973) that the rule cannot stand because promulgated by an impermissibly biased agency. *Gibson* represents only a logical extension of the fundamental rule that one accused of violating the law is entitled to a fair trial before a fair tribunal, be that tribunal a jury, a judge or an administrative body entrusted with adjudicative authority. With respect to an agency's legislative as opposed to adjudicative acts, however, there is "no federal constitutional requirement that legislators and rule makers must be free of bias or interest." *Wall v. Am. Opt. Ass'n, Inc.*, 379 F. Supp. 175, 180 (N.D.Ga. 1974), *aff'd mem.* 419 U.S. 888 (1974) (emphasis in original). See *Rogers v. Friedman*, 438 F.Supp. 428, 433 (E.D.Tex. 1977) *cert. granted*, — U.S. — (1978). The plaintiffs expressly disavow any intention of attacking the state's delegation of rule making authority to the Commission. *Rite-Aid Corp. v. Bd. of Pharm. of New Jersey*, 421 F.Supp. 1161, 1169-70 (D.N.J. 1976). Nor have they pressed the claim that, apart from the general question of the regulation's validity, these particular defendants are so biased that they cannot constitutionally sit in judgment on plaintiff Barrett's violation of it. Indeed, it may be doubted if that argument would properly be before this panel at all, see *Rite-Aid Corp. v. Bd. of Pharm. of New Jersey*, *id.* at 1170 n. 18. Accordingly, the plaintiffs' *Gibson* claim must fail under the precepts of *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) and its progeny. *Wall v. Am. Opt. Ass'n, Inc.*, 379 F.Supp. at 190-91.

12a

In all other respects the motion for reconsideration is denied.

I HEREBY CERTIFY that all three members of this three-judge Court have concurred in the foregoing order.

DATED June 27, 1978.

/s/ BRUCE R. THOMPSON
UNITED STATES DISTRICT JUDGE

13a

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

CENTURY 21 REAL ESTATE CORPORATION, et al.,
Plaintiffs,

vs.

THE NEVADA REAL ESTATE ADVISORY COMMISSION, et al.,
Defendants.

Civil No. 76-136 BRT

Summary Judgment

In consideration of the Opinion filed April 12, 1978, and the order amending said opinion filed concurrently herewith,

IT HEREBY IS ORDERED, ADJUDGED and DECREED that the action entitled above be, and it hereby is, dismissed with prejudice.

DATED June 27, 1978.

/s/ BRUCE R. THOMPSON
UNITED STATES DISTRICT JUDGE

cc to Cnsl.

Dtd. 6-28-78

APPENDIX D

JON R. COLLINS, Esq.
 LIONEL, SAWYER AND COLLINS
 1700 Valley Bank Plaza
 300 South Fourth Street
 Las Vegas, Nevada 89101
 Telephone (702) 385-2188

J. STEPHEN PEEK, Esq.
 HALE, LANE, PEEK, DENNISON AND HOWARD
 201 West Liberty Street
 Reno, Nevada 89501
 Telephone (702) 786-7900

JOHN P. MORAVEK, Esq.
 18872 MacArthur Boulevard
 Irvine, California 92715
 Telephone (714) 752-7521
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF NEVADA

• • •

CENTURY 21 REAL ESTATE CORPORATION, a California corporation; CENTURY 21 REAL ESTATE OF ARIZONA, INC., an Arizona corporation; SOUTHERN NEVADA FRANCHISE SERVICE Co., INC., a Nevada corporation; and ROBERT E. BARRETT, and BARRETT & Co., INC. REALTORS, a Nevada corporation,

Plaintiffs,

vs.

THE NEVADA REAL ESTATE ADVISORY COMMISSION; ROBERT W. HASS, ELIZABETH M. KROLAK, FRED M. SCHULTZ, OLIVIA D. SILVAGNI and CARL F. FUETSCH, members thereof; and ANGUS W. MCLEOD, Administrator of the Nevada Real Estate Division,

Defendants.

Civil No. R-76-136 BRT

Notice of Appeal

Filed August 25, 1978

NOTICE IS HEREBY GIVEN that plaintiffs Century 21 Real Estate Corporation, Century 21 Real Estate of Arizona, Inc., Southern Nevada Franchise Service Co., Inc. and Robert E. Barrett, and Barrett & Co., Inc., hereby appeal to the Supreme Court of the United States from the judgment of the three-judge district court entered in this action on the 27th day of June, 1978.

This appeal is taken under 28 U.S.C. 1253.

DATED: This 25th day of August, 1978.

/s/ J. STEPHEN PEEK
 J. Stephen Peek, Esq.
 HALE, LANE, PEEK, DENNISON AND HOWARD
 201 West Liberty Street
 Reno, Nevada 89501

Attorneys for Plaintiffs

APPENDIX E

Relevant provisions of the Nevada Revised Statutes and regulations promulgated thereunder are set forth below:

14.065 Personal service of process on party outside state.

1. Personal service of summons upon a party outside this state is sufficient to confer upon a court of this state jurisdiction of the person of the party so served if:

(a) Such service is made by delivering a copy of the summons, together with a copy of the complaint, to the party served in the manner provided by statute or rule of court for service upon a person of like kind within this state; and

(b) Such party has submitted himself to the jurisdiction of the courts of this state in a manner provided by this section.

2. Any person who, in person or through an agent or instrumentality, does any of the acts enumerated in this subsection thereby submits himself and, if an individual, his personal representative to the jurisdiction of the courts of this state as to any cause of action which arises from the doing of such acts:

(a) Transacting any business or negotiating any commercial paper within this state;

(b) Committing a tortious act within this state;

(c) Owning, using or possessing any real property situated in this state;

(d) Contracting to insure any person, property or risk located within this state at the time of contracting; or

(e) Living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for alimony, child support or

property settlement, if the other party to the marital relationship continues to reside in this state.

3. Only causes of action arising from these enumerated acts may be asserted against a defendant in an action in which jurisdiction over him is based on this section.

4. The method of service provided in this section is cumulative, and may be utilized with, after or independently of other methods of service.

193.120 Classification of crimes.

1. A crime is an act or omission forbidden by law and punishable upon conviction by death, imprisonment, fine or other penal discipline.

2. Every crime which may be punished by death or by imprisonment in the state prison is a felony.

3. Every crime punishable by a fine of not more than \$500. or by imprisonment in a county jail for not more than 6 months, is a misdemeanor.

4. Every other crime is a gross misdemeanor.

193.140 Punishment of gross misdemeanors. Every person convicted of a gross misdemeanor shall be punished by imprisonment in the county jail for not more than 1 year, or by a fine of not more than \$1,000, or by both fine and imprisonment, unless the statute in force at the time of commission of such gross misdemeanor prescribed a different penalty.

233B.060 Notice of adoption, amendment, repeal of regulation; hearings; emergency regulations; reasons for agency action.

1. Prior to the adoption, amendment or repeal of any regulation, the agency shall give at least 30 days' notice of

its intended action, unless a shorter period of notice is specifically permitted by statute.

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3. All interested persons shall be afforded a reasonable opportunity to submit data, views or arguments, orally or in writing. With respect to substantive regulations, opportunity for oral hearing must be granted if requested by any interested person who will be directly affected by the proposed regulation. The agency shall consider fully all written and oral submissions respecting the proposed regulation.

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6. Upon adoption of a regulation, the agency, if requested to do so by an interested person, either prior to adoption or within 30 days thereafter, shall issue a concise statement of the principal reasons for and against its adoption, and incorporate therein its reasons for overruling the consideration urged against its adoption.

(Added to NRS by 1965, 964; A 1973, 621; 1975, 1157, 1413)

233B.100 Petitions for adoption, filing, amendment, repeal of regulations; required action by agency.

Any interested person may petition an agency requesting the adoption, filing, amendment or repeal of any regulation and shall accompany his petition with relevant data, views and arguments. Each agency shall prescribe by regulation the form for such petitions and the procedure for their submission, consideration and disposition. Upon submission of such a petition, the agency shall within 30 days either deny the petition in writing, stating its reasons, or initiate regulation-making proceedings in accordance with NRS 233B.060.

(Added to NRS by 1965, 965)

645.050 Nevada real estate advisory commission: Creation; number and appointment of members, powers and duties.

1. A commission to be known as the Nevada real estate advisory commission is hereby created. The commission shall consist of five members appointed by the governor. The governor shall obtain and consider a list of nominees from the Nevada Association of Realtors.

2. The commission shall act in an advisory capacity to the real estate division, promulgate rules and regulations, approve or disapprove all applications for licenses, and conduct hearings as provided in this chapter.

3. The commission may by regulation delegate any authority conferred upon it by this chapter to the administrator to be exercised pursuant to the regulations of the commission.

645.190 Powers of real estate division; regulations; reference manuals, study guides.

1. The real estate division may do all things necessary and convenient for carrying into effect the provisions of this chapter.

2. The commission or the administrator, with the approval of the commission, may from time to time adopt reasonable regulations for the administration of this chapter. When regulations are proposed by the administrator in addition to other notices required by law, he shall provide copies of the proposed regulations to the commission no less than 30 days prior to the next commission meeting. The commission shall approve, amend or disapprove any proposed regulations at such meeting.

3. All regulations adopted by the commission, or adopted by the administrator with the approval of the commission,

shall be published by the division and offered for sale at a reasonable fee.

4. The real estate division may publish a reference manual or study guide for licensees or applicants for licenses, and may offer it for sale at a reasonable fee.

645.630 Grounds for disciplinary action against licensees. The commission may suspend, revoke or reissue subject to conditions any license issued under the provisions of this chapter at any time where the licensee has, by false or fraudulent representation, obtained a license, or where the licensee, whether or not acting as a licensee, is found to be guilty of:

1. Making any substantial misrepresentation.

.

9. Disregarding or violating any of the provisions of this chapter, chapter 119 of NRS or of any regulation promulgated under either chapter. . . .

645.850 Penalties.

1. Any person, copartnership, association or corporation violating a provision of this chapter, upon conviction thereof, if a person, is guilty of a gross misdemeanor, and if a copartnership, association or corporation, shall be punished by a fine of not more than \$2,500.

2. Any officer or agent of a corporation, or member or agent of a copartnership or association, who shall personally participate in or be accessory to any violation of this chapter by such copartnership, association or corporation, shall be subject to the penalties herein prescribed for individuals.

3. Nothing herein contained shall be construed to release any person, corporation, association or copartnership from civil liability or criminal prosecution under the general laws of this state.

4. The administrator may prefer a complaint for violation of NRS 645.230 before any court of competent jurisdiction, and may take the necessary legal steps through the proper legal officers of this state to enforce the provisions thereof.

5. Any court of competent jurisdiction shall have full power to try any violation of this chapter, and upon conviction the court may, at its discretion, revoke the license of the person, copartnership, association, or corporation so convicted, in addition to imposing the other penalties herein provided.

Rules and Regulations for Nevada Revised Statutes Chapter 645

Section VII (2)(a).

Any advertisement, in any media, for the sale or purchase of any interest in real property listed with a broker, shall clearly indicate the licensed status of such licensee, by use in said advertisement of the name of the broker, or the corporate or fictitious name under which he does business. No advertisement of real property shall, under any circumstances, be used by any licensee when only a post office box, telephone number, or street address appears. . . .

22a

APPENDIX F

Int. Cl.: 35

Prior U.S. Cl.: 101

United States Patent Office

Reg. No. 1,071,592

Registered Aug. 16, 1977

SERVICE MARK
Principal Register



Century 21 Real Estate Corporation (California corporation)

2114 N. Broadway
Santa Ana, Calif. 92711

For: REAL ESTATE BROKERAGE SERVICES, in CLASS 35 (U.S. CL. 101).

First use Sept. 9, 1973; in commerce Sept. 9, 1973.

Without waiving any of its common law rights therein, applicant disclaims the words "Real Estate" apart from the mark as shown.

Owner of Reg. No. 963,138.

Ser. No. 67,620, filed Oct. 31, 1975.

R. F. CISSEL, Examiner

23a

Int. Cl.: 35

Prior U.S. Cl.: 101

United States Patent and Trademark Office

Reg. No. 1,091,541

Registered May 16, 1978

SERVICE MARK
Principal Register



Century 21 Real Estate Corporation (California corporation)

18872 MacArthur Blvd.
Irvine, Calif. 92715

For: REAL ESTATE BROKERAGE SERVICES, in CLASS 35 (U.S. CL. 101).

First use at least as early as Apr. 16, 1972; in commerce at least as early as Apr. 16, 1972.

Without waiving any of its common law rights in the terms "Real" and "Estate," said terms are disclaimed apart from the mark as shown.

Owner of Reg. No. 1,063,488.

Ser. No. 133,893, filed July 14, 1977.

I. S. SIGLIN, Examiner

24a

Int. Cl.: 36

Prior U.S. Cl.: 101

United States Patent and Trademark Office

Reg. No. 1,104,464

Registered Oct. 17, 1978

SERVICE MARK
Principal Register



Century 21 Real Estate Corporation (California corporation)

18872 MacArthur Blvd.

Irvin, Calif. 92715

For: REAL ESTATE BROKERAGE SERVICES, in Class 36 (U.S. CL. 101).

First use at least as early as Apr. 16, 1972; in commerce at least as early as Apr. 16, 1972.

The outline of the rectangular space is not part of the mark, per se, but applicant does claim rights in the remaining subject matter, including the display and ratio size of the mark "Century 21" to the size of the licensee's name which is placed in the rectangular space.

25a

The mark consists of applicant's mark "Century 21" and building design shown in a five (5) to one (1) ratio to the rectangular space outlined at the bottom of the drawing. This rectangular space contains the corporate or trade name of applicant's individual licensees when affixed to various signs and other materials used by applicant and/or its licensees.

Ser. No. 138,501, filed Aug. 22, 1977.